



U.S. Department
of Transportation
**Federal Highway
Administration**

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Mr. Douglas B. MacDonald
Secretary of Transportation
Department of Transportation
Olympia, Washington

Attention: Paula J. Hammond

Flexibility in the Right-of-Way Process

Dear Mr. MacDonald:

During my participation in the "Government-to-Government" breakout session at the Freight Conference on October 8, 2001, a question was raised by a local agency representative regarding the flexibility of the right-of-way certification process and the availability of streamlining options to facilitate obtaining certification approval. To assist you in addressing any similar questions, which may be posed by local agencies, we have prepared the following synopsis of the right-of-way certification process and identified some streamlining opportunities which should help achieve successful certification approval.

Federal regulations require a right-of-way certification prior to advertising for bids. As 23 CFR 635.309 states: "Authorization to advertise the physical construction for bids or to proceed with force account construction thereof shall normally be issued as soon as, **but not until**, all of the following conditions have been met...". There are 15 conditions, identified as subsections (a) through (o), under 635.309; condition (a) is that there be an approved PS&E, and condition (c) is the requirement for a right-of-way certification.

Subsection (c) requires a statement that "all individuals and families have been relocated to decent, safe and sanitary housing or the State has made available to relocatees adequate replacement housing". This subsection further requires one of three types of certifications, identified in sub-subsections (1) through (3) and commonly known as "cert 1", "cert 2" and "cert 3".

1. A cert 1 is appropriate when all rights-of-way, including access rights, have been acquired and the State has both legal and physical possession of the property. There may be some improvements remaining, but all occupants have vacated the property.

2. A cert 2 is appropriate when not all rights-of-way have been acquired, but the State has a legal right to occupy and use the right-of-way (usually by right of entry or the legal process of “possession and use”). Again, there may be some improvements remaining, but all occupants have vacated the right-of-way.
3. A cert 3 is appropriate when not all rights-of-way have been acquired **and** there are still occupants remaining on the right-of-way. However, the regulation specifically states: “The State may request authorization on this basis only in very unusual circumstances. This exception must never become the rule.” The regulation goes on to state that if construction proceeds under a cert 3, “the State shall ensure that occupants of residences, businesses, farms, or non-profit organizations who have not yet moved from the right-of-way are protected against unnecessary inconvenience and disproportionate injury or any action coercive in nature.” The regulation includes requirements for the State to provide a full and detailed explanation for each parcel that has not been obtained, the reasons why, and a realistic date when physical occupancy and use can be expected.

The WSDOT’s Right-of-Way manual (Chap. 1-15.1.2) contains procedures which mirror 23 CFR 635.309 on right-of-way certification. We have a verbal understanding with WSDOT’s Real Estate Services section that a project can proceed to advertising, letting and construction with a cert 1 or 2. We also have worked closely with them on the use of cert 3s and there have been a few instances where we have approved a cert 3 for purposes of advertising a project, but with the condition that it be upgraded to a cert 1 or 2 prior to bid opening.

With regard to local agencies, these same procedures apply. Consequently, a local agency project can be advertised with a cert 1 or 2. In “unusual circumstances”, we (WSDOT and the Division Office) will consider a cert 3 for advertising, with the understanding that it will be upgraded to a cert 1 or 2 before bid opening. Very often, the “unusual circumstances” presented to us are simply that the local agency needs to meet a predetermined (or politically desirable) advertising and/or letting date—that is not a true “unusual circumstance”. One “unusual circumstance” that has enabled us to approve a cert 3 is the need to make a “fish window” (e.g., to be able to construct at a time other than when salmon are spawning).

Regarding the local agencies’ desire for more flexibility with the certification process, the Washington Division Office has allowed the maximum flexibility that the regulations provide. As quoted above, the regulations limit cert 3s to “unusual circumstances” and state that “this exception must never become the rule.” We have, in fact, approved some cert 3s for local agencies, so we have exercised the latitude that the regulations allow to accommodate valid “unusual circumstances”.

It is commonplace for agencies to try to make up for time that is added to the project development process by trying to pick it up in the right-of-way phase. There are some ways this can be done. The agency can buy as much right-of-way as they want prior to NEPA clearance using their own funds; although they do not get reimbursed, they can use the purchase price as part of their project match. They can buy a limited number of parcels under the provisions of 23 CFR 710.503 and preserve Federal reimbursement.

In addition to advance acquisition, the agency can begin the right-of-way process earlier and tighten up the design to eliminate later design changes which necessitate major changes to the

right-of-way (e.g., adding new parcels or expanding or reducing the area of taking from existing parcels, which necessitate new appraisals). Additionally, we can (and have) authorized appraisals and title work prior to NEPA clearance.

In summary, the right-of-way certification process affords the State and local agencies some flexibility while, at the same time, affording the protections to property owners and displacees provided in Federal law (the Uniform Act). Both Federal law (TEA-21) and regulations (23 CFR 710.501, 503 and 771.117) provide early acquisition opportunities to States and local agencies. Finally, early coordination between the agency's planning, environment, design and right-of-way staffs can help reduce or eliminate design changes which can both delay the right-of-way process and add significantly to the cost of a project. We cannot overemphasize the importance of early coordination with Right-of-Way staff. Very often, potential barriers to acquiring rights-of-way and moving displacees in a timely manner can be identified early enough in the project development phase to enable project decision-makers to resolve them and move more expeditiously through the right-of-way phase.

I hope this information will contribute to your continuing efforts to improve the delivery of transportation products and services in a timely and efficient manner. The opportunities which early coordination and advance acquisition offer can help you achieve those goals. If there are further questions or if clarification is needed please contact Dave Leighow at 753-9486.

Sincerely,

DANIEL M. MATHIS, P.E.
Division Administrator

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